GOH PAIK SWAN

v.

NG CHOO LUM @ NG POON LUM

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
N.H. CHAN JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO.P-02-681 OF 1995]
9 OCTOBER 1996

LAND LAW: *Caveat - Form 19B - Application for entry of caveat - Caveator seeking to sustain caveat on grounds not stated in Form 19B - Whether allowable - Whether wrong for Court to ignore statement in the Form - National Land Code 1965 ss. 323(1), 327.*

LAND LAW: *Caveat - Application for removal - Whether to remain on the register - Issues to consider - Whether caveatable interest existed - Whether evidence adduced disclosed a serious question to be tried - Balance of justice - Failure by trial Judge to examine issues - Whether a serious misdirection - Whether no proper exercise of discretion - National Land Code 1965 ss. 323(1), 327.*

LAND LAW: *Caveat - Application for removal - Issues to consider - Option to purchase land - Issue of whether option has been properly exercised - Whether per se and without more constituted a serious question calling for trial.*

CONTRACT: *Agreement - Agreement to purchase land - Construction of terms - Whether amounted to an enforceable contract - Whether only an option - Whether option exercised.*

On 4 May 1995, the appellant, the registered proprietor of two pieces of land (the lands), executed a document purporting to sell the lands to the respondent for RM45,000 per acre. The document also stated that the appellant had received RM8,000 as deposit which would be forfeited if no agreement made within two weeks thereof. On 17 May 1995, the respondent's solicitors informed the appellant that the respondent intended to proceed with the purchase of the lands, and for that purpose had deposited with them a sum of RM35,611.30. The appellant did not respond to this letter and consequently no agreement whatsoever was executed by the parties.

On 19 May 1995, the respondent entered a caveat against the lands. In his application therefor in Form 19B, the respondent described the document of 4 May 1995 as an "option" for the sale and purchase of the lands. However,

at the hearing of the appellant's motion to remove the caveat on 11 July 1995, the respondent changed his stand and argued before the Court below that the document of 4 May 1995 was in fact an "enforceable contract". The learned Judge, ignoring apparently the contents of Form 19B, agreed that the document was a good contract, and on that sole ground, sustained the caveat. It was evident that the learned Judge, in sustaining the caveat, and ruling that a caveatable interest existed on account of the binding contract, had not examined the questions of (i) serious question to be tried and (ii) balance of convenience.

In this appeal, a question arose as to whether the learned Judge was wrong in the approach that he adopted, such that a fresh examination of the case by the Court of Appeal is called for.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] This Court is unable to agree with the interpretation that the learned Judge had placed upon the document in question. The document of 4 May 1995 does not amount to a contract. It was merely an option granted by the appellant to sell the lands by an agreement to be executed within the stated time-frame. Since no agreement was ever executed, the option lapsed at the end of the two-week period.

[2] On the principles enunciated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor. and Murugappa Chettiar v. Lee Teck Mook*, the learned Judge was dutybound to ask himself three questions before permitting the caveat to remain on the register, namely (i) whether the respondent disclosed a caveatable interest (ii) if so, whether the evidence that was produced in support of his claim to that caveatable interest disclosed a serious question to be tried (iii) if so, whether the balance of justice lay in favour of the caveat remaining on the register.

[3] The learned Judge, while resolving the first question in the respondent's favour, clearly had not entered upon the second question. Accordingly, there was no proper exercise of discretion by the learned Judge in relation to the appellant's application. In these circumstances, it is open to this Court, and indeed this Court is dutybound, to examine the matter afresh.

[4] The learned Judge did not sufficiently address his mind to the facts as presented to him. Since, in Form 19B, the respondent had described the document of 4 May 1995 as an option, he was obliged to sustain its existence upon that ground. Consequently, it was not open for him to argue, as he did before the learned Judge, that the document of 4 May 1995 was not an option but an enforceable contract. It was also wholly

wrong for the learned Judge to have ignored a solemn claim made in a form prescribed by Parliament for purposes of imposing a serious restraint upon the exercise by a registered proprietor of his rights over his immovable property.

[5] Here is a case of a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

[6] Because the basis of the respondent's claim to the titles to the said lands rested on an option, it was for him to satisfy the Court that he had exercised the option in the manner prescribed therein, or, that he had been prevented by the appellant from doing so. In this the respondent clearly failed.

[7] There was not only no exercise of the option, but the way in which the respondent purported to sustain the caveat at the hearing of the motion demonstrated sufficiently that his claim to the lands failed to disclose a serious question to be tried. The case of *Kho Ah Soon v. Duniaga Sdn. Bhd.* is not authority for the proposition that whenever the question arises as to whether an option has been properly exercised, it is to be regarded, without more, as a serious question calling for a trial.

[8] The learned Judge had misdirected himself by failing to subject the affidavit evidence in this case to the meticulous scrutiny called for by Jemuri Serjan CJ (Borneo) in *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd.* Had he done so, he would not have directed the caveat to remain on the register.

[Appeal allowed]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Kaveat - Borang 19B - Permohonan untuk kemasukan kaveat - Pengkaveat berusaha untuk mengekalkan kaveat atas alasan-alasan yang tidak dinyatakan dalam Borang 19B - Samada boleh dibenarkan - Samada salah bagi Mahkamah untuk tidak menghiraukan penyataan dalam Borang - Kanun Tanah Negara 1965 ss. 323(1), 327.*

UNDANG-UNDANG TANAH: *Kaveat - Permohonan untuk pembatalan - Samada hendaklah kekal dalam daftar - Isu-isu yang harus dipertimbangkan - Samada kepentingan berkaveat wujud - Samada keterangan yang dikemukakan mendedahkan satu persoalan yang serius untuk dibicarakan - Imbangan keadilan - Kegagalan oleh Hakim*

perbicaraan untuk memeriksa isu - Samada merupakan satu salah-arahan yang serius - Samada tidak terdapat pelaksanaan budibicara yang wajar - Kanun Tanah Negara 1965 ss. 323(1), 327.

UNDANG-UNDANG TANAH: *Kaveat - Permohonan untuk pembatalan.- Isu-isu untuk dipertimbangkan - Opsyen untuk membeli tanah - Isu samada opsyen telah dilaksanakan dengan sempurna - Samada dengan sendirinya (per se) dan tidak lebih daripada itu telah membentuk satu persoalan yang serius yang mewajarkan suatu perbicaraan.*

KONTRAK: *Perjanjian - Perjanjian untuk membeli tanah - Pentafsiran terma-terma - Samada membawa kepada suatu kontrak yang boleh dikuatkuasakan - Samada hanya merupakan satu opsyen - Samada opsyen dilaksanakan.*

Pada 4 Mei 1995, perayu, yang merupakan tuanpunya berdaftar bagi dua bidang tanah (tanah-tanah tersebut), telah menyempurnakan satu dokumen dengan maksud untuk menjual tanah-tanah tersebut kepada responden bagi nilai sebanyak RM45,000 se-ekar. Dokumen itu juga menyatakan bahawa perayu telah menerima RM8,000 sebagai deposit, yang mana akan dirampas jika tiada perjanjian dibuat dalam tempoh dua minggu daripada tarikh di situ. Pada 17 Mei 1995, peguamcara responden telah memaklumkan perayu bahawa responden berniat untuk meneruskan pembelian tanah-tanah tersebut, dan bagi tujuan itu telah mendepositkan dengan mereka satu jumlah sebanyak RM35,611,30. Perayu telah tidak menjawab surat ini dan akibatnya tiada apa-apa perjanjian disempurnakan oleh pihak-pihak berkenaan.

Pada 19 Mei 1995, responden telah memasukkan kaveat terhadap tanah-tanah tersebut. Dalam permohonannya dalam Borang 19B, responden menerangkan bahawa dokumen bertarikh 4 Mei 1995 adalah satu opsyen bagi penjualan dan pembelian tanah-tanah tersebut. Walaubagaimana pun, sewaktu usul perayu untuk membatalkan kaveat tersebut didengar pada 11 Julai 1995, responden telah menukar pendiriannya dan berhujah di hadapan Mahkamah di bawah bahawa dokumen bertarikh 4 Mei 1995 itu adalah pada hakikatnya suatu "kontrak yang boleh dikuatkuasakan". Hakim yang bijaksana, tanpa menghiraukan kandungan Borang 19B, bersetuju bahawa dokumen tersebut adalah suatu kontrak yang sempurna, dan atas alasan yang tunggal itu, telah mengekalkan kaveat tersebut. Ianya jelas bahawa Hakim yang bijaksana, dalam mengekalkan kaveat tersebut, dan memutuskan bahawa kepentingan berkaveat wujud berdasarkan kontrak yang mengikat itu, telah tidak memeriksa persoalan mengenai (i) persoalan-persoalan yang serius untuk dibicarakan dan (ii) imbangan keselesaan.

Dalam rayuan ini, satu persoalan telah berbangkit mengenai samada Hakim yang bijaksana adalah salah dalam pendekatan yang diterima-pakainya, yang mana menyebabkan kes tersebut perlu diperiksa semula oleh Mahkamah Rayuan.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Mahkamah ini tidak dapat bersetuju dengan tafsiran yang telah dinyatakan oleh Hakim yang bijaksana terhadap dokumen yang dipersoalkan. Dokumen bertarikh 4 Mei 1995 tidak membawa kepada satu kontrak. Ianya adalah hanya merupakan satu opsyen yang telah diberikan oleh perayu untuk menjual tanah-tanah tersebut kepada responden melalui satu perjanjian yang akan disempurnakan dalam tempoh yang telah ditetapkan. Oleh kerana tiada perjanjian yang telah disempurnakan, opsyen tersebut telah luput pada penghujung tempoh dua minggu.

[2] Berdasarkan prinsip-prinsip yang disebut dalam *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor. and Murugappa Chettiar v. Lee Teck Mook,* Hakim yang bijaksana adalah terikat kepada tugasnya untuk menanyakan tiga soalan sebelum membenarkan kaveat tersebut kekal pada daftar, iaitu (i) samada responden telah mendedahkan satu kepentingan yang boleh dikaveatkan (ii) jika demikian, samada keterangan yang telah dikemukakan bagi menyokong tuntutannya terhadap kepentingan yang boleh dikaveat itu telah mendedahkan satu persoalan yang serius untuk dibicarakan (iii) jika demikian, samada imbangan keadilan memihak kepada kaveat itu kekal pada daftar.

[3] Hakim yang bijaksana, sementara memutuskan persoalan pertama dengan memihak kepada responden, dengan jelasnya telah tidak menyentuh persoalan yang kedua. Berikutan itu, tidak terdapat perlaksanaan budibicara yang sempurna oleh Hakim yang bijaksana berhubung dengan permohonan perayu. Dalam keadaan ini, ianya adalah terbuka kepada Mahkamah ini, malahan Mahkamah ini adalah terikat kepada kewajipan, untuk memeriksa perkara tersebut semula.

[4] Hakim yang bijkasana telah tidak memikirkan dengan semasak-masaknya akan fakta-fakta yang dikemukakan kepadanya. Oleh kerana, dalam Borang 19B, responden telah menerangkan dokumen bertarikh 4 Mei 1995 tersebut sebagai satu opsyen, maka beliau adalah bertanggungan untuk mengekalkan kewujudannya berdasarkan alasan itu. Akibatnya, ianya tidak terbuka baginya untuk berhujah, sepertimana yang telah dilakukan olehnya di hadapan Hakim yang bijaksana, bahawa dokumen bertarikh 4 Mei 1995 itu bukannya suatu opsyen tetapi adalah suatu kontrak yang berkuatkuasa.

Ianya juga sama sekali salah bagi Hakim yang bijaksana untuk tidak menghiraukan satu tuntutan yang dibuat secara bersumpah dalam borang yang ditetapkan oleh Parlimen yang bertujuan mengenakan tegahan yang serius terhadap tuanpunya berdaftar dari melaksanakan haknya ke atas hartanahnya yang tidak boleh dialih.

[5] Ini adalah satu kes mengenai seorang pengkaveat yang memasukkan kaveatnya berdasarkan satu alasan dan kemudiannya, ketika mendapati alasan itu tidak dapat dipertahankan, berusaha pula untuk mengekalkan kaveat tersebut atas alasan alternatif yang lain yang tidak disebut dalam Borang 19B. Perkara ini, selain daripada tidak boleh dibenarkan, juga menunjukkan kesesiaan tuntutan pengkaveat kepada hakmilik tersebut.

[6] Disebabkan asas tuntutan responden kepada hakmilik-hakmilik tanah tersebut bergantung pada sesuatu opsyen, maka ianya bertanggungan untuk membuktikan bahawa ianya telah melaksanakan opsyen itu menurut cara yang ditetapkan di dalamnya, atau, bahawa beliau telah dihalang oleh perayu daripada melakukan sedemikian. Responden dengan jelasnya telah gagal dalam hal ini.

[7] Bukan sahaja tidak terdapat perlaksanaan akan opsyen itu, tetapi cara bagaimana responden bermaksud untuk mengekalkan kaveat itu di perbicaraan usul menunjukkan secukupnya bahawa tuntutannya terhadap tanah-tanah tersebut telah gagal untuk mendedahkan satu persoalan yang serius untuk dibicarakan. Kes *Kho Ah Soon v. Duniaga Sdn. Bhd.* bukanlah merupakan otoriti bagi proposisi bahawa apabila persoalan berbangkit mengenai sama ada satu opsyen telah dilaksanakan dengan sempurnanya, ianya hendaklah dianggapkan, per se, sebagai satu persoalan serius yang memerlukan perbicaraan.

[8] Hakim yang bijaksana telah tersalah-arah akan dirinya sendiri kerana gagal menghadapkan keterangan afidavit dalam kes ini kepada suatu penelitian seperti yang dianjurkan oleh Jemuri Serjan HB (Borneo) dalam kes *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* Sekiranya beliau telah melakukan sedemikian, beliau tentunya telah tidak mengarahkan supaya kaveat itu kekal pada daftar tersebut.

[Rayuan dibenarkan]

Cases referred to:

Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor. [1995] 3 CLJ 520; [1995] 1 MLJ 719 ***(foll)***

Murugappa Chettiar v. Lee Teck Mook [1995] 2 CLJ 545; [1995] 1 MLJ 782 ***(foll)***

Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd. [1994] 3 CLJ 133; [1994] 2 MLJ 754 ***(refd)***

Voo Syun Mui v. Yap Mooi Mooi [1984] 2 MLJ 48 ***(refd)***
Charles Grenier Sdn. Bhd. v. Lau Wing Hong [1996] 3 AMR 3533
Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd. [1992] 1 MLJ 263 ***(foll)***
Kho Ah Soon v. Duniaga Sdn. Bhd. [1996] 2 CLJ 218; [1996] 1 AMR 977 ***(dist)***
Godecke & Anor. v. Kirwan [1973] 1 ALR 457 ***(dist)***

Legislation referred to:
National Land Code 1965, ss. 323(1), 327

For the appellant - V. Muthusamy (Santhi Muthusamy with him); M/s V. Muthusamy & Tan
For the respondent - Saw Lip Khai (Ooi Teik Hoe with him); M/s Ooi Lee & Co.

JUDGMENT

Gopal Sri Ram JCA:

The only issue in this appeal is whether the respondent had a caveatable interest in the appellant's lands. The learned Judge resolved that issue in the respondent's favour. We disagreed with the learned Judge and held that there was no caveatable interest.

Indeed, having read the record provided with great care, we formed the view that the Judge was clearly wrong and, for that reason, called upon Counsel for the respondent to support the judgment appealed from without requiring Counsel for the appellant to argue the appeal. Having heard arguments from Counsel for the respondent, we were satisfied that the preliminary view which we had formed of the matter was entirely correct. We therefore reversed the learned Judge. The reasons for our decision now follow.

The brief facts of this case are as follows.

The appellant is the registered proprietor of two pieces of land held under Geran Mukim No. GM 169 for lot No. 578 and Geran Mukim No. GM 170 for lot No. 579 in Daerah Seberang Perai, Selatan ('the said lands'). On 4 May 1995, the appellant executed a document which reads as follows:

> I Goh Phaik Swan I/C No. 8383203 of 12, Bunga Raya Satu, off Jalan Raja Uda, 13000, Butterworth, P.W. hereby agree to sell two piece of land Lot 578 & 579 Mk 9 Transkrian Sek Perai to Mr Ng Choo Lum & Ng Poon Lum at the price of RM45,000 per acre.
>
> Hereby I received RM8,000 as deposit. Deposit for RM8,000 will be forfeited if agreement is not make within 2 weeks date hereof.
>
> Thank you
>
> Your Faithfully,
>
> Sgd.

On 17 May 1995, M/s. J.B. Lim & Associates, a firm of advocates and solicitors wrote to the appellant a letter which reads as follows:

> Dear Sir/Madam,
>
> **Re: Lot No. 578 & 579 Mukim 9, Transkrian, Daerah Seberang Perai Selatan**
>
> We refer to the above and inform you that pursuant to your letter dated 4 May 1995 the Intending Purchaser Ng Chu Lum & Ng Poon Lum has deposited a sum of RM35,611.30 being the balance of the deposit sum with us with the purpose of proceeding with the purchase of the subject properties.
>
> We are in the process of preparing the Sale and Purchase Agreement for your execution and shall be pleased if you could attend at our office for us to settle the terms and conditions for the Sale and Purchase Agreement.

The appellant did not respond to this letter.

On 19 May 1995, the respondent entered a caveat against the titles to the said lands. The application for the caveat was supported by a statutory declaration by the respondent's solicitor, Mr. Lim Jit Boo. In his application for the entry of a caveat in Form 19B, the respondent stated, among other things, that he had paid a sum of RM35,611.30 to M/s J.B. Lim & Associates in accordance with the document dated 4 May 1995, which he described as an "option". There was, however, no sale and purchase agreement either negotiated or executed by the parties.

On 11 July 1995, the appellant moved the High Court under s. 327 of the National Land Code 1965 ('the code') for the removal of the respondent's caveat. That application was refused by the learned Judge upon the sole ground that the respondent had a caveatable interest because the document of 4 May 1995 was an enforceable agreement by which the parties had bound themselves on the subject of the sale.

Although the learned Judge referred to the decisions of this Court in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor.* [1995] 3 CLJ 520; [1995] 1 MLJ 719 and *Murugappa Chettiar v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782, it would appear that he did not sufficiently appreciate the propositions established by these cases. Nor did he properly apply them to the facts of the case before him. All that the learned Judge did was to find that the respondent had a caveatable interest. And on that basis he held that the caveat ought to remain. He went no further. Accordingly, there was no proper exercise of discretion by the learned Judge in relation to the appellant's application. In these circumstances, it is open to this Court – indeed we are duty bound – to examine the matter afresh.

We find it is unnecessary to undertake a detailed examination of the principles applicable to the present case. Suffice that we remind ourselves of what was said by this Court in *Murugappa Chettiar (supra)* (at p. 788) in relation to the three hurdles which a caveat must surmount before it may be permitted to remain upon the register:

> The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned Judicial Commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

The peculiar facts of the instant case render it convenient to deal with the first and second questions together. These are: (1) whether the respondent had shown that he had a caveatable interest; and (2) whether the respondent had demonstrated that his claim discloses a serious question requiring or calling for a trial.

The Judge, as earlier observed, resolved the first question in the respondent's favour, but did not enter upon the second. He did so on the footing that the document of 4 May 1995 was a concluded contract for the sale and purchase of the said lands. And he drew support for his view from the decision of the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133; [1994] 2 MLJ 754 and of the former Federal Court in *Voo Syun Mui v. Yap Mooi Mooi* [1984] 2 MLJ 48. Indeed, the learned Judge quoted the following passage (at p. 52 of the report) from the judgment of Syed Agil Barakbah FJ in the latter case:

> In our view the evidence and exhibits in this case and also the conduct of the appellant clearly show that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale. What remained to be done was for the respondent to exercise the option in accordance with the terms stated in the option. The mere fact that it was subject to an agreement to be signed did not necessarily mean there was no legal binding and enforceable agreement.

We would, for completeness, quote the following passage from the very recent decision of the Federal Court in *Charles Grenier Sdn. Bhd. v. Lau Wing Hong* [1996] 3 AMR 3533:

> An agreement to make an agreement does not result in a contract. It is for the Court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the Court reaches an opposite conclusion, then there is an enforceable contract.

Reverting to the judgment of the learned Judge, we are, with respect, unable to agree with the interpretation that he placed upon the document in question. In our judgment, the document of 4 May 1995 does not amount to a contract. It was merely an option granted by the appellant to the respondent to sell the said lands to the respondent. That option was to be exercised by the execution of an agreement between the parties within the time frame therein stipulated. In the event, no agreement was made and the option lapsed at the end of the two-week period. We also note that there was never any suggestion, either in the correspondence or in the respondent's affidavit, that the appellant, by his words or conduct, prevented the execution of the agreement contemplated by the terms of the document of 4 May 1995.

Meaning no disrespect to the learned Judge, it would appear that he did not sufficiently address his mind to the facts that were presented to him. The respondent had, in his application in Form 19B for the entry of the caveat, described the document of 4 May 1995 as an option and not as an agreement. Having entered the caveat on that footing he was, if he desired this restraint to remain upon the register, obliged to sustain its existence upon the grounds stated by him in his aforesaid application. It will be wholly wrong to ignore, as the learned Judge did, a solemn claim made in a form prescribed by Parliament for purposes of imposing a serious restraint upon the exercise by a registered proprietor of his rights over his immovable property.

Because the basis of the respondent's claim to the titles to the said lands rested on an option, it was for him to satisfy the Court that he had exercised the option in the manner prescribed therein, or, that he had been prevented by the appellant from doing so. And in this he plainly failed. Since the agreement was never executed within the time limited by the option, no contract came into existence.

The learned Judge also overlooked the inconsistent stand taken by the respondent when he came to resist the application to remove the caveat. In his affidavit filed in opposition to the appellant's motion, the respondent said that the document of 4 May 1995 was an agreement made between himself and the appellant. He then went on to say that if the document of 4 May 1995 is to be construed as an option, then, he had duly exercised it. There is no necessity for us to deal with the second contention. We have earlier expressed our satisfaction that the option was never exercised.

Taking the former contention, the stance that the document in question was an agreement was clearly not the basis upon which he had entered the caveat. Here is a case of a caveator entering his caveat upon one ground and later, on finding that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in the Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

Unfortunately, the learned Judge sustained the caveat, not upon the grounds relied on by the respondent in his Form 19B, but upon a wholly different basis advanced in the affidavit, namely, that the document of 4 May 1995 was good as a contract. In our judgment, the learned Judge misdirected himself by failing to subject the affidavit evidence in the case to the meticulous scrutiny called for by Jemuri Serjan CJ (Borneo) in *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* [1992] 1 MLJ 263. Had he done so, he would not have directed the caveat to remain on the register.

In our judgment, not only was there no exercise of the option, but the way in which the respondent purported to sustain the caveat at the hearing of the motion demonstrated sufficiently that his claim to the said lands failed to disclose a serious question to be tried.

Mr. Saw Lip Khai, of Counsel for the respondent submitted that it would be quite wrong for us to hold that his client's claim did not raise a serious question to be tried. Whether the option dated 4 May 1995 had been properly exercised by the respondent, he argued, was a serious question to be tried. He said that the matter had been concluded in his client's favour by high authority. In support of these arguments Counsel referred to the decision of the Federal Court in *Kho Ah Soon v. Duniaga Sdn. Bhd.* [1996] 2 CLJ 218; [1996] 1 AMR 977, where Peh Swee Chin FCJ, speaking of the option granted by the unsuccessful appellant in that case said (at p. 983):

> First the Court below said that the caveator had no cause of action as between the caveator and the caveatee, because there was no privity of contract. **We are unable to agree; since the option was an offer, such cause of action would be dependent on the highly controversial issue as to whether the offer was validly accepted. This would be a serious question for trial, dependent on evidence and cross-examination**.
>
> The Court below said that the letter of acceptance being allegedly posted by the caveator to the caveatee was never received. Further on the issue of the sub-option, the notice of exercising the said sub-option on a woman who claimed to be the wife of the said Tan was not effective. These disputed issues with what has been stated in the preceding paragraph, should not and could not be used by the lower Court to decide the fate of the motion, please see *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433, PC, i.e. a Court should decide

> only on consideration of undisputed facts in affidavits and not on credibly denied allegations, in the absence of oral evidence and cross-examination, *per* Lord Templeman at p. 436, *ibid.* (Emphasis added.)

Counsel relied upon that part of the above-quoted passage to which we have lent emphasis as concluding the issue against the appellant. With respect we do not agree.

In our judgment, the passage following that relied on by Counsel amply demonstrates the context in which the Federal Court found the question whether the particular option in that case had been validly exercised to be one requiring *viva voce* investigation. Accordingly, it is clear that *Kho Ah Soon* is **not** authority for the proposition advanced by Counsel, namely, that whenever the question arises as to whether an option has been properly exercised, it is to be regarded, without more, as a serious question calling for a trial. Since each case depends for its result on its own facts, it is extremely unsafe to place reliance upon words spoken in the context of a particular case. We therefore entertain no difficulty whatsoever in dissenting from the submission made by Counsel for the respondent.

Mr. Saw also urged upon us the decision of the Australian High Court in *Godecke & Anor. v. Kirwan* [1973] 1 ALR 457 which he said was authority for the proposition that where parties who employ a common solicitor enter into a transaction without reaching agreement upon important terms, the common solicitor may fix those terms as between them. The following passage in the judgment of Walsh J (at p. 466) was read to us:

> It is clearly established that a binding agreement may be made which leaves some important matter, eg. the price, to be settled by the decision of a third party. I agree with respect with the view of Bray CJ that, subject to the qualifications to which he refers ([1968] SASR at 398), there is no reason in principle for holding that there cannot be any binding contract if some matter is left to be determined by one of the contracting parties.
>
> In the present case the parties set out all the principal terms which were to govern the sale and purchase of the land and these included provisions which imposed by implication an obligation to execute a formal contract. There was also a promise by the purchaser to execute, if required to do so, a further agreement in accordance with cl. 6. In my opinion, that clause should be construed as limited to permitting the insertion of covenants and conditions not inconsistent with those contained in the offer. It was limited also by the reference to the reasonableness of requiring the inclusion of the covenants and conditions. In my opinion, this does not mean that anything may be required which, in the opinion of the solicitors, is reasonable. It means that what is required must be reasonable in an objective sense, and in case of dispute this is a matter which the Court can decide. Clause 6 does not mean that the purchaser is making an

agreement to agree later upon additional provisions to govern the bargain. It means that he is agreeing presently to accept as part of the bargain such additional provisions, if any, as are required, provided that they satisfy the requirements of consistency with the other terms and of reasonableness to which I have referred. If, contrary to my view, cl. 6 authorises the vendor to require the execution of a further agreement after the contract contemplated by cl. 3 and Special Condition 1 has been executed, then cl. 6 would still operate subject to the limitations already discussed and, in my opinion, the vendor, if he wished to take advantage of it, would have to invoke it within a reasonable time, this again being a matter for decision if necessary by a Court. The fact that more than one view may be open as to the time at which and the manner in which cl. 6 was intended to operate does not itself require a conclusion that the agreement is void for uncertainty: see *Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd.* [1968] 118 CLR 429, at 436-7.

With respect to Counsel we are unable to see the relevance of his arguments to the case at hand. As earlier observed, this case concerns an option by the terms of which an agreement had to be made within two weeks of its date, failing which the consideration paid for the option was forfeitable by the appellant. This is a common feature of options which leave an offer open for a fixed period of time for consideration. In the circumstances, we would respectfully decline the invitation of Counsel to embark upon a discussion of the principles discussed in *Godecke (supra).*

Having come to the conclusion that the learned Judge was wrong in the decision he had arrived at, we allowed the appeal with costs in this Court and of the proceedings in the Court below. The deposit paid into Court was ordered to be paid out to the appellant to account of his taxed costs. The caveat was also ordered to be removed forthwith.

Reported by W.A. Sharif